

STATE OF INDIANA



INDIANA UTILITY REGULATORY COMMISSION
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IN THE MATTER OF THE PETITION BY)
COGENTRIX LAWRENCE COUNTY, LLC)
FOR DETERMINATIONS OF THE COMMISSION'S)
JURISDICTION OVER PETITIONER'S)
ACTIVITIES AS AN EXEMPT WHOLESALE)
GENERATOR UNDER FEDERAL LAW)

FILED

DEC 04 2003

INDIANA UTILITY
REGULATORY COMMISSION
CAUSE NO. 41599

You are hereby notified that on this date the Indiana Utility Regulatory Commission ("Commission") has caused the following entry to be made:


On January 18, 2001, the Commission issued a Final Order ("Final Order") in this Cause. While the Commission approved the relief requested by Cogentrix Lawrence County, LLC, ("Petitioner") the Presiding Officers understand that the current owner of the site has been purchased by Goldman Sachs. If such transfer of ownership occurred, it did so without prior approval of the Commission and is in violation of the terms of the Final Order in this matter. In addition, the Presiding Officers are not aware of any current plans to begin construction of the facility approved in this Cause as the Petitioner has also failed to file reports to keep the Commission apprised of the progress of construction at the site, which is also required by the Final Order. (A copy of the Final Order is attached for ease of review).

Accordingly, the Presiding Officers hereby find that the Petitioner should file a Progress Report with the Commission that fully identifies the current status, and anticipated timeframes for completion of the facility approved in this matter. In addition, the Progress Report should include a discussion of any transfer of ownership of the facility, and the Petitioner's anticipated timeframe for seeking Commission review of any such transfer. The Progress Report should be filed with the Commission on or before December 19, 2003.

IT IS SO ORDERED.



David E. Ziegner, Commissioner



Abby R. Gray, Administrative Law Judge



Date



Nancy E. Manley, Secretary to the Commission

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INDIANA UTILITY REGULATORY COMMISSION

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**IN THE MATTER OF THE PETITION BY)
COGENTRIX LAWRENCE COUNTY, LLC)
FOR DETERMINATIONS OF THE)
COMMISSION'S JURISDICTION OVER)
PETITIONER'S ACTIVITIES AS AN)
EXEMPT WHOLESALE GENERATOR)
UNDER FEDERAL LAW)**

CAUSE NO. 41599

APPROVED:

JAN 18 2001

BY THE COMMISSION:

David E. Ziegner, Commissioner

Abby R. Gray, Administrative Law Judge

On November 18, 1999, Cogentrix Lawrence County, LLC ("Cogentrix" or "Petitioner") filed its verified petition ("Petition") with the Commission concerning an approximately 800 megawatt generation facility ("Facility") it proposes to construct south of Bedford, Indiana. In its Petition, Cogentrix has requested that the Commission determine that (1) Cogentrix is not a "public utility" as defined by Indiana law, and (2) that the Facility is not a "utility" as defined by Indiana law. In the alternative, if the Commission determines that Cogentrix is a "public utility" or the Facility is a "utility", Cogentrix requests that the Commission decline to exercise jurisdiction over the Petitioner for a term of thirty (30) years. Petitions to intervene were filed by Citizens Action Coalition of Indiana, Inc. ("CAC"), Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier"), and Indianapolis Power & Light Company ("IPL"), which petitions were granted.

On June 7, 2000, pursuant to notice duly given and published as required by law, a hearing on the Petition was convened at 9:30 a.m. EST in this cause in Room TC10, Indiana Government Center South, Indianapolis, Indiana. That hearing continued to, and was concluded on, June 8, 2000. At that hearing, Petitioner's Direct and Rebuttal Testimony and Exhibits were accepted into the evidentiary record of this Cause. Testimony and Exhibits of Intervenor CAC and of the Indiana Office of Utility Consumer Counselor ("OUCC") also were admitted into the evidentiary record. Members of the public, representing Lawrence County and the city of Mitchell also presented oral testimony under oath at the hearing and were cross-examined by counsel. With the exception of Hoosier, which withdrew its intervention in this proceeding on August 11, the parties individually submitted briefs subsequent to the hearing. Petitioner also filed post-hearing exhibits that were, by stipulation of the parties, marked and received into the evidentiary record.

Subsequent to the filing of the post-hearing briefs and Petitioner's additional exhibits, the parties jointly submitted a proposed order to the Commission on November 1, 2000.

Based upon the applicable law and evidence herein, the Commission now finds:

1. **Notice and Jurisdiction.** Notice of the Petition and the proceedings in this case was duly given and published more than ten (10) days prior to the hearing in newspapers of general circulation published in the English language as required by law.

Petitioner intends to own, operate, and control plant and equipment within this state for the production of electricity. Petitioner represents that it does not intend to sell the electricity generated by the Facility to the general public or to any retail customer. Petitioner did not request authority to exercise any of the rights or privileges of a public utility in the construction and operation of the Facility, e.g., eminent domain, use of public rights-of-way, etc. Petitioner has represented that it does not intend to recover its costs through a rate base/rate of return or other process typically associated with "public utility" rates. Petitioner will construct the Facility and the output of the Facility will be sold to one or more power marketers operating in a competitive environment. Petitioner argues that its construction and operation of the Facility, and the ultimate purchase by any public utility, either directly or indirectly, of the electricity it generates, should not cause Petitioner to become a "public utility." In the alternative, Cogentrix requests that the Commission decline jurisdiction over the Petitioner for a term of years.

The Indiana Court of Appeals has held that the Commission has the authority and duty, when requested under appropriate circumstances, to determine whether a business is a public utility. *Hidden Valley Lake Property Owners v. HVL Utilities*, 408 N.E.2d 622, at 629 (Ind. App. 1980) (*reh'g den.*, 411 N.E.2d 1262). Further, the Commission has jurisdiction to decline to exercise, in whole or in part, its jurisdiction over an "energy utility." Ind. Code § 8-1-2.5. Therefore, the Commission has jurisdiction over Petitioner and the subject matter of the Petition to the extent necessary to consider and hear evidence on the Petition and make the findings and orders herein contained.

2. **Petitioner's Characteristics and Business.** Based on record evidence, Petitioner is a Delaware limited liability company authorized to do business in Indiana. Petitioner is an indirect, wholly-owned subsidiary of Cogentrix Energy, Inc., a North Carolina corporation. Cogentrix Energy, Inc., through its subsidiaries, develops, owns, and operates electric generating plants, principally in the United States, each of which is either a qualifying facility under the Public Utility Regulatory Policies Act of 1978 or an eligible facility of an Exempt Wholesale Generator ("EWG") under the Public Utility Holding Company Act of 1935, as amended ("PUHCA"). Cogentrix Energy, Inc. built and currently operates 10 electric generating plants and has equity interests in another 25 facilities in 10 states, giving it total plant production capability of approximately 4,000 megawatts. Cogentrix Energy, Inc. is currently financing or constructing additional plants that will deliver approximately 2,150 megawatts of electricity, and has in active development projects totaling in excess of 6,500 megawatts. Cogentrix Energy, Inc. has nearly 20 years of experience in the electric power industry. Financing for the Facility will be non-recourse, project financing under which Cogentrix will contribute funds for an equity interest in the Facility to an extent negotiated during financing. In reliance on a tolling arrangement, which will provide sufficient cash flow to service the debt payments, a lender or lenders will provide the remainder of the funds secured by a first mortgage interest in the Facility. The benefits that will accrue by having additional capacity available at the earliest possible date in Indiana are an impetus for Petitioner's construction of the Facility. Petitioner has

represented that time is of the essence for consideration of the Petition if the Facility is to be constructed and operational for usage as currently planned by the second quarter of 2003.

The proposed Facility will have a net power production capacity of approximately 800 megawatts and will be located on approximately 40 acres of land three (3) miles south of Bedford, Indiana in Lawrence County. The Facility will be fueled by natural gas and will operate as a combined cycle facility. The electric transmission lines owned by Cinergy Corp. ("Cinergy"), with which the Facility will interconnect, are located on the site. The interstate gas transmission lines owned by ANR Pipeline Company ("ANR") with which the Facility proposes to interconnect are also located on the site. The Facility will use water, which it proposes to obtain either from the East Fork White River near where the site is located or from wells, or both. The Facility will discharge water into the East Fork White River.

Petitioner plans to enter into primarily long-term agreements with a presently unknown purchaser or purchasers which will contract to purchase all of the electricity generated by the Facility for purposes of resale to others. Neither Petitioner nor any affiliate will contract to sell electricity generated by the Facility to any end use consumer in Indiana. Petitioner plans that the agreements will be in the nature of a tolling arrangement under which the purchaser or purchasers ("tolling parties") would be responsible for arranging for and providing the natural gas fuel supplies for the Facility. Moreover, the tolling parties would be responsible for determining the dispatch of the Facility and arranging for and clearing contract paths for transmission of electricity from the Facility. As described in a post-hearing exhibit, Petitioner may initially finance the development and construction of the Facility with a "mini-perm" loan at the expiration of which it could refinance the Facility.

Upon completion, the Facility will generate electricity solely for sales for resale in the wholesale market. These sales for resale, and any associated transmission upgrades needed to effect such sales, will be subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act, as amended ("FPA").

3. Relief Requested. Petitioner has asserted that its construction, ownership, and operation of the Facility as stated above will not make Petitioner an Indiana "public utility" as defined by Ind. Code § 8-1-2-1(a). Petitioner further contends that the Facility will not be an Indiana "utility" as defined by Ind. Code § 8-1-2-1(g). Petitioner therefore requests that the Commission find as follows: (1) that Cogentrix is not a "public utility" as defined by Indiana law; and (2) that the Facility is not a "utility" as defined by Indiana law.

In the alternative, if the Commission finds that Petitioner is a public utility under Indiana law, Petitioner requests that the Commission substantially decline to exercise its jurisdiction of Cogentrix, as a public utility, and the Facility, as a utility, including, but not limited to, jurisdiction under Ind. Code § 8-1-8.5.

Petitioner asserts that the exercise of the Commission's jurisdiction over Petitioner and its construction and operation of the Facility is unnecessary and would be a waste of the Commission's resources. Petitioner represents that, on the other hand, declination of jurisdiction over Petitioner by the Commission would be beneficial to the Commission, Petitioner, and the electricity consumers of Indiana. Petitioner alleges that such a declination would permit immediate and necessary construction of the Facility to meet electric energy use requirements in Indiana. Petitioner further alleges that such a declination will allow Petitioner to promote energy utility efficiency, reliability, and competitive rates for power.

4. Conclusions and Order Upon Review of Facts and Issues. Petitioner has asserted that, if the Commission finds from the record evidence that Petitioner is a "public utility" for purposes of Indiana's utility power plant construction law (Ind. Code § 8-1-8.5-1, et seq.), then Petitioner would be an "energy utility" as defined by Ind. Code § 8-1-2.5.2. The Commission may decline to exercise its jurisdiction pursuant to Ind. Code § 8-1-2.5-1, et seq., including the Commission's jurisdiction under Ind. Code § 8-1-8.5-1, et seq., to issue certificates of public convenience and necessity for the construction of the Facility. Whether Petitioner may be determined to be a "public utility" as defined by Indiana law is pivotal to our ultimate conclusion in this matter. In order for the Commission to decline to exercise jurisdiction over Petitioner pursuant to Ind. Code § 8-1-2.5 (or to issue Petitioner a certificate of public convenience and necessity under Ind. Code § 8-1-8.5 if it retains such jurisdiction), the Commission must assert jurisdiction over Petitioner as a public utility. If Petitioner is not a public utility, then the Commission has no jurisdiction to exercise or decline to exercise.

Jurisdiction over Petitioner as a public utility for purposes of the construction and operation of the Facility requires a two-part analysis:

- (a) Does Petitioner own, operate, manage, or control any plant or equipment within the state for the production, transmission, delivery, or furnishing of power (Ind. Code § 8-1-2-1(a)), and
- (b) Are Petitioner's plant or equipment used "for service directly or indirectly to the public", i.e., "publicly". See United States Corp. v. Northern Indiana Public Service Company, 486 N.E.2d 1082, 1084-85 (Ind. App. 1985) and Hidden Valley Lake Property Owners v. HVL Utilities, 408 N.E.2d 622, at 629 (Ind. App. 1980) (*reh'g den.*, 411 N.E.2d 1262).

Petitioner intends to own, operate, and control an electric generation facility. The evidence also clearly establishes that Petitioner's construction and operation of the Facility is for the purpose of sale of the power generated by that plant in the wholesale market to entities that will in turn sell that power to public utilities within and without Indiana. The Commission has found in prior cases that a business that only generates electricity and then sells that electricity directly to public utilities is itself a public utility. See e.g., In re Petition of Commonwealth Edison of Indiana, Inc., Cause No. 36093 (Ind. Util. Reg. Comm'n, June 12, 1990); In re Petition of AES Greenfield, LLC, Cause No. 41361 (Ind. Util. Reg. Comm'n, March 11, 1999) wherein the Commission specifically found that it had

jurisdiction over entities like Petitioner. Consequently, for purposes of the construction and operation of the Facility, we find that Petitioner is a public utility within the meaning of Ind. Code § 8-1-2-1.

While we conclude that Petitioner will be a "public utility" as defined in the Public Service Commission Act, the Indiana Code authorizes the Commission to decline to exercise, in whole or in part, jurisdiction over an "energy utility" if certain conditions are satisfied. In particular, the Indiana Code provides that "the Commission may enter an order, after notice and hearing, that the public interest requires the Commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over . . . the energy utility . . ." Ind. Code § 8-1-2.5-5.

In determining whether the public interest will be served, the Commission will consider the following:

- (1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the Commission unnecessary or wasteful.
- (2) Whether the Commission's declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility's customers, or the state.
- (3) Whether the Commission's declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.
- (4) Whether the exercise of Commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment.

Ind. Code § 8-1-2.5-5.

If Petitioner is an Indiana public utility, it is also an "energy utility" under Indiana law and the Commission may elect to decline jurisdiction over Petitioner pursuant to Ind. Code § 8-1-2.5-5. In determining whether the public interest would be served by such a declination, the Commission concludes that it should consider, among other things, whether the proposed location of the electric generation facility will significantly and negatively impact an Indiana electricity supplier or its customers. In addition, the Commission will require evidence that market conditions exist that will support the construction of a plant selling at competitive rates into the wholesale market. Finally, the Commission will examine the Petitioner's financial viability and proposed financing structure for the project.

As noted in Finding No. 2, Petitioner does not intend, nor does it request authority, to sell the electricity generated by the Facility to the general public or to any retail customer. Instead, the power will be generated solely for sales for resale subject to the jurisdiction of FERC under the provisions of the FPA. The Petitioner acknowledges that, consistent with FERC precedent, it is required to pay for the costs of interconnection with

Cinergy and that it will be responsible for costs that may be incurred under FERC tariffs and regulations. The Petitioner agrees to operate its Facility in a manner consistent with good utility practice. Petitioner does not seek or request authority to exercise any of the rights, powers, or privileges of an Indiana public utility in the construction and operation of the Facility, e.g., the power of eminent domain, the use of public rights of way, etc. Further, Petitioner's costs will not be recovered through a rate base/rate of return or other process typically associated with public utility rates. Economic risks associated with construction of the Facility will be borne by Petitioner or its tolling counterparties which purchase electricity generated by the Facility. Petitioner has presented evidence that the citizens of Lawrence County have reviewed and support Cogentrix's construction and operation of the Facility, and we note that no evidence was presented to indicate any local opposition to the Facility.

To operate as an EWG, Petitioner must apply to FERC for such status. 15 U.S.C. § 79z-5 (a)(1). In addition, Petitioner's wholesale rates and charges for the sale of energy will be filed with FERC and are required to be just and reasonable, in conformity with standards set by FERC. 16 U.S.C. § 824d. Once Petitioner's rates filed with FERC are accepted, Petitioner will be subject to certain corporate and financial regulation and the monitoring of its market sales by FERC. Nothing herein should be construed to replace or affect any approvals needed on environmental issues under Indiana and federal law from the Indiana Department of Environmental Management or the U.S. Environmental Protection Agency. Therefore, Petitioner must obtain all necessary approvals from the appropriate agencies.

As noted above, as part of our public interest analysis regarding any proposed declination of jurisdiction, we must evaluate facilities such as Petitioner's based on a number of factors, including the following:

Location: As part of its public interest determination, the Commission considered whether there is local support as evidence in merchant plant and peaker cases. Included in this consideration is whether the location of a proposed facility is compatible with the surrounding land uses. In determining compatibility, the Commission may evaluate and consider any evidence of compliance with local zoning and land use requirements. In this case, Petitioner submitted evidence that the local community in Lawrence County supports the proposed facility and there is no evidence to the contrary.

In deciding whether to decline jurisdiction over the Petitioner and the Facility, the Commission has authority to consider whether the public interest will be served by the Facility being in its planned location. In such a review, the Commission considers, among other factors, the potential for adverse effects on Indiana "electricity suppliers" (as that term is used in Ind. Code § 8-1-2.3) or their customers in deciding whether to decline, or subsequently reassert, jurisdiction over Petitioner or the construction of its Facility. Indiana statutes prohibiting interference with water use for "domestic purposes" (Ind. Code § 14-25-1-3) and the permitting authority of the Indiana Natural Resources Commission (Ind. Code § 14-25-7-15) do not limit our jurisdiction to make such determinations under the public interest standards of Ind. Code § 8-1-2.5 or the public convenience and necessity standards of Ind. Code § 8-1-8.5-5(b)(3). If a proposed new power plant will significantly and negatively impact an electricity supplier or its consumers, the Commission

may refuse to decline jurisdiction under Ind. Code § 8-1-2.5 and Ind. Code § 8-1-8.5. Similarly, while FERC has jurisdiction over interstate transmission service, this Commission may consider the effects that a new power plant could have on other Indiana electricity suppliers, and their consumers, when determining whether to decline jurisdiction over, or to certify construction of, a new power plant. As with water use impacts, if a new power plant will cause significant adverse effects on the facilities of any Indiana electricity supplier, the Commission may refuse to decline jurisdiction under Ind. Code § 8-1-2.5 and Ind. Code § 8-1-8.5 in order to assure that Indiana consumers, or the public utilities that serve them, are not harmed. In this regard, this Commission does not decline any jurisdiction it has to adjudicate disputes regarding alleged adverse impacts on the transmission and distribution facilities of an Indiana electricity supplier and its consumers.

With specific regard to Petitioner's Facility, Petitioner has filed with the Commission and served on the parties a System Impact Study ("SIS"), Petitioner's analysis regarding gas supplies for the Facility ("Gas Study"), and evidence for the record regarding the Facility's lack of impact on the water rights and water uses of other Indiana utilities. Thus, in this case, the Petitioner has demonstrated, through record evidence, that the impact of the Facility on transmission systems of Indiana utilities, and the impact of the Facility on regional gas supplies and water use rights, will not adversely impact Indiana utilities or Indiana consumers. We note that Petitioner also has requested Cinergy to serve its SIS on all of the Indiana utilities interconnected to Cinergy, and has demonstrated that the local community in Lawrence County supports the proposed Facility. Accordingly, on the basis of this information, we have determined that the public interest will be served if the Facility is located as planned.

Need: In determining the public interest, the Commission will review and make a determination of need (i.e., will the development of additional generating capacity serve the public interest). To demonstrate need, entities must provide evidence that a proposed facility will meet the demands of the market; a mere assertion that the wholesale market is competitive is insufficient to meet this standard. As the Commission has noted in previous orders, it is aware of the changing business environment for the production and marketing of electricity at wholesale, in which "merchant" plants are increasingly common. Merchant plants are projected to be mostly gas-fired combustion turbines and combined cycle units. Moreover, the need for more power was demonstrated by the extreme heat events experienced in Indiana in June 1998 and July 1999. Petitioner has submitted to the Commission, under seal, its market analysis for the Midwest power market. For informational purposes only, Petitioner will also submit to the Commission, under seal, prior to construction all executed tolling agreements for the Facility and a certificate that it has received financing for the Facility. Together, these documents will provide the evidence necessary for the Commission to be satisfied that there is not only a generic need for power in the region, but also a particular need for the power to be generated by the Facility. This information also has been or will be provided to the OUCC and the CAC on a confidential basis. The proposed Facility should reduce the cost of power and provide additional power that, in turn, will benefit ratepayers in Indiana. Given the need for additional capacity, and the submission of Petitioner's evidence, the additional capacity should benefit Indiana consumers. Petitioner has also agreed to provide notice of any

change in the in-service date, which the Commission may use to refine its integrated resource planning for Indiana utilities.

Financing: To ensure that ratepayers and consumers are not adversely affected by the proposed development of generation plants in Indiana, developers must demonstrate to the Commission that the financial structure of a proposed project will not jeopardize retail electric supply. Specifically, the Commission is concerned that highly leveraged projects may adversely impact the public interest, and present undue risk to Indiana's jurisdictional retail utilities which must maintain the reliability of retail electric supply at its current level. In assessing a developer's financing to ensure the viability of a proposed project, the Commission may consider the developer's ability to finance, construct, own, and operate other generating facilities in a commercially responsible manner. As necessary, the Commission also may consider the specific method proposed to finance a particular project, including the debt/equity ratio proposed by a developer.

In this case, we are presented with a proposed Facility that will be financed under a highly leveraged "project financing" arrangement whereby the Facility's loans will be repaid from the project's revenue stream. Specifically, Petitioner may initially finance the development and construction of the Facility with a "mini-perm" loan at the expiration of which it could refinance the Facility; the loans will be repaid from revenues generated by the Facility's sale of power into the wholesale market. To ensure that Indiana consumers are not adversely affected by such financing arrangements, developers must demonstrate the long-term economic viability of their proposed projects. In this proceeding, Petitioner has filed its market analysis for the Midwest power market to demonstrate that there is a need for the power generated by the Facility. Petitioner also has agreed to file, prior to construction of the Facility, its executed tolling agreements. Additionally, Petitioner will file a certificate that it has received financing for the Facility. Together, these documents should provide the evidence necessary for the Commission to be satisfied that the proposed Facility will have a sufficient revenue stream to cover the long-term capital and operating costs of the Facility. The Commission also notes that Cogentrix Energy, Inc. has built, and currently operates, 10 electric generating plants and has equity interests in another 25 facilities in 10 states, giving it total plant production capability of approximately 4,000 megawatts. In addition, Cogentrix Energy, Inc., which has nearly 20 years of experience in the electric power industry, is currently financing or constructing additional plants totaling approximately 2,150 megawatts. This evidence indicates that Cogentrix Energy, Inc. has been able to finance, construct, own, and operate other generating facilities in a commercially responsible manner. Thus, Petitioner, a wholly-owned subsidiary of Cogentrix Energy, Inc., has adequately demonstrated that it has the technical, financial, and managerial capability to construct and operate the Facility, and we are confident that Petitioner's development of the Facility will not adversely affect ratepayers or consumers, or otherwise jeopardize retail electric supply. Accordingly, based on the record evidence, we decline to exercise jurisdiction with respect to any financing of the Facility. Further, we specifically decline to exercise jurisdiction with respect to the initial refinancing of the Facility.

In addition to determining whether the public interest would be served if the Commission declines jurisdiction over Petitioner, the Commission also must consider what

actions it must take to ensure that the public interest is served throughout the commercial life of the Facility. Specifically, the Commission must determine the extent to which it must reserve its authority over Petitioner's activities involving affiliate transactions and transfers of ownership.

Affiliate Transactions: To ensure that the Commission's declination of jurisdiction over an "energy utility" is in the public interest, the Commission must be assured that adequate consumer protections are in place should an "energy utility" subsequently become an affiliate, as defined in Ind. Code § 8-1-2-49, of any regulated Indiana utility. While the Commission is declining jurisdiction over Petitioner's affiliate transactions initially, the Commission reserves its authority to regulate Petitioner should it become an affiliate of any regulated Indiana utility. Petitioner agrees to inform the Commission and the OUCC of any affiliation with any regulated utility operating in Indiana at the time of its occurrence. Further, Petitioner agrees to obtain prior Commission approval with respect to the sale of any electricity to any such affiliated regulated Indiana utility (or any affiliate thereof). Accordingly, if Petitioner becomes affiliated with any regulated Indiana utility, or if Indiana statutes are subsequently amended to allow for competition in retail electric markets and Petitioner (either directly or through an affiliate) engages in retail electric sales, Petitioner will, without further action of this Commission, automatically become subject to the following: (1) all applicable regulations governing affiliate relationships as those regulations exist at the time Petitioner becomes an "affiliate" of a regulated Indiana utility; or (2) regulations governing retail electric sales in Indiana under such subsequently enacted Indiana statutes. To the extent that Indiana statutes are subsequently amended to provide for retail competition in Indiana, nothing in this Order shall confer special regulatory status on Petitioner with respect to such changes in law. The Commission notes that under section 201(g)(C) of the FPA, this Commission retains its authority to examine the books, accounts, memoranda, contracts, and records of an EWG that sells electric energy to an affiliated regulated Indiana utility and, under section 32(k) of PUHCA, retains authority to review affiliate transactions between EWGs and regulated Indiana retail utility affiliates.

Transfers of Ownership: In determining the public interest the Commission may place limitations on any transfers of ownership of the assets of an energy utility over which we have otherwise disclaimed jurisdiction. Therefore, we are retaining our jurisdiction in this respect and require Petitioner to seek Commission approval of any transfer of the assets owned by Petitioner. Petitioner, however, shall not be required to seek prior approval of any transfers of ownership of the Facility assets or ownership interests in the Petitioner involving: (1) the grant of a security interest to a bank or other lender or collateral agent, administrative agent or other security representative, or a trustee on behalf of bondholders in connection with any financing or refinancing (including any lease financing); (2) a debtor in possession; or (3) a foreclosure (or deed in lieu of foreclosure) on the property owned by Petitioner or ownership interests in Petitioner. Additionally, a third-party owner and operator may succeed to Petitioner's declination of jurisdiction, provided: (1) the Commission determines that the successor has the necessary technical, financial, and managerial capability to own and operate the Facility; and (2) the successor agrees to the same terms and conditions imposed on Petitioner as set forth in this Order.

Given the above findings, and the additional requirements contained in this Order, the Commission believes that a declination of jurisdiction over Petitioner as an energy utility, except over the areas discussed above as to which we are reserving our jurisdiction, is in the public interest. While the Commission is not declining jurisdiction over Petitioner for a particular term of years, the Commission does not intend to reassert jurisdiction over Petitioner absent circumstances affecting the public interest. *See, In the Matter of An Investigation into Centrex Charters Offered by Indiana Bell Telephone Company, Inc., d/b/a Ameritech Indiana*, Cause No. 40612, September 13, 1996. Petitioner is not granted authority to offer its power for sale to the general public. Therefore, any revenue that it derives from the sale of electricity for resale by the purchaser is not subject to the public utility fee.

5. **Financial Assurance.** The Commission has previously determined that it is in the public interest that merchant plants petitioning this Commission establish and maintain an independent financial instrument to ensure that funds will be available in the event of abandonment, financial failure, and/or bankruptcy to return the site to its current condition. We find Petitioner herein should also be subject to this condition. The financial instrument utilized may, at the Petitioner's option, be established by one of the following options:

- (1) Surety bond;
- (2) Letter of credit;
- (3) A certificate of insurance;
- (4) Financial test;
- (5) Corporate guarantee, or
- (6) Other financial guarantee approved by the Commission.

In order to ensure that adequate funds will be available for this purpose, the Petitioner should prepare a cost estimate that contains a detailed estimate of the costs associated with fully decommissioning the Facility and returning the site to its current condition. The financial instrument selected and utilized by the Petitioner must be sufficient to cover the costs contained in the cost estimate. A copy of the current cost estimate and the financial instrument selected by the Petitioner must be submitted to the Secretary of the Commission for approval within sixty (60) days of the date of approval of this Order. The cost estimate and corresponding financial instrument must be revised by the Petitioner every five (5) years to account for inflation.

6. **Reporting Requirements.** If after notice and hearing the Commission determines that Petitioner either (1) has failed to commence construction of the Facility within two years of the date of this Order and is no longer diligently pursuing the commencement of construction of the Facility, or (2) has not completed construction of the Facility within five years of the date of this Order, then this declination of jurisdiction will automatically terminate. In addition to the foregoing reporting requirements, it shall be a condition of this Order and our continued partial declination of jurisdiction over Petitioner's operations, that it file with the Commission Annual Reports as provided in I.C. 8-1-2-49 and provide such other information as the Commission may from time to time request.

These reporting requirements are intended to ensure that the Commission obtains reliable up-to-date information in a timely manner necessary to carry out its statutory obligations regarding the construction and operation of generating facilities, as well as the statutory obligations of the Commission's State Utility Forecasting Group, and the Office of the Utility Consumer Counselor. The Commission will require the following reports ("Reporting Requirements") be prepared and filed by the Petitioner. A responsible officer of Petitioner shall verify all reports. The Petitioner shall provide one (1) paper copy and one (1) electronic copy to the Secretary of the Commission, and to the OUCC, within the timeframes prescribed below:

(a) **Planning Report:** A Planning Report that includes the following information shall be submitted to the Commission within six (6) weeks of approval of this Order. To avoid unnecessary duplication, it is not necessary for the Petitioner to refile information that remains unchanged and has been previously submitted.

- (1) Project ownership and name(s) of the facility;
- (2) Name, title, address, and phone number(s) for primary contact person(s) at the facility;
- (3) Specific location (county and nearest city or town);
- (4) Ownership of land on which the facility is located;
- (5) Anticipated "boilerplate capacity" of the unit. If multiple units will be located at the proposed site list the anticipated boilerplate capacity of each unit.
- (6) Unit type (manufacturer, model number, operational characteristics);
- (7) Primary fuel to be used by the facility;
- (8) Secondary fuel (if applicable)
- (9) Connecting utility(s)
- (10) Copy of "System Impact Studies" prepared by connecting utility(s)
- (11) Primary and, if applicable, secondary water source
- (12) Expected in-service (commercial operation) date;
- (13) An estimate of the engineering\construction timeline and critical milestones for the facility.

(b) **First Year Report:** A First Year Report, that includes the following information, shall be submitted within thirteen (13) months of the in-service date.

- (1) Summer and winter dependable capacity ratings;
- (2) Annual capacity factor, summer seasonal (June through August) capacity factor, and winter seasonal (December through March) capacity factor. Please include hours of operation annually and for each season;
- (3) Annual average gas usage, average daily gas usage, peak output gas usage;
- (4) Total annual, peak day, and summer seasonal water usage and discharge; itemization of any operational and or environmental

- restrictions placed upon the Facility during the year as a result of environmental conditions or impacts;
- (5) Itemization of transmission Loading Restrictions (TLRs) or other operational restrictions incurred during the year;
 - (6) Number of employees employed by the Facility.

7. **Construction Notices.** Brief notifications shall also be filed with the Commission during the construction period as follows:

(a) **Start-Up Report:** A Construction Start-up Report, that includes the following information, shall be submitted one (1) week prior to commencement of construction activities.

- (1) Status of permits from the Indiana Department of Environmental Management (IDEM), Indiana Department of Natural Resources (DNR), and, if applicable, United States Army Corps of Engineers, and other necessary permits;
- (2) Expected in-service date;

(b) **Mid-Point Notice:** A Mid-Point Report, that includes the following information, shall be submitted at the mid-point described on the timeframes and contained in the "Planning Report." In the event the actual construction schedule is at variance with the construction timeframes, the Petitioner will provide an explanation for the variation in the schedule and shall include a revised estimate of the completion schedule.

- (1) Status of construction;
- (2) Expected in-service date;

(c) **Testing Notification Notice:** A Testing Notice shall be submitted to the Commission two (2) weeks prior any testing of the facility, and should advise the Commission that testing of the facility is about to begin.

(d) **In-Service Notice:** An In-Service Notice that includes the following information shall be submitted to the Commission at the time of the initial commercial operation of the generating facility.

- (1) Contracts for firm utility sales and contracts for firm sales to Indiana utilities. Please itemize the contract amount and the entity;
- (2) A summary of fuel contracts (e.g., "tolling arrangement," firm, spot] and itemize the pipeline(s) involved in the transactions;
- (3) Contingency plans, if any, detailing response plans to emergency conditions as required by state or local units of government, transmission owner and /or relevant regional transmission grid operator;
- (4) Certified (or accredited) dependable capacity rating.

8. Notification of Changes in Capacity or Operation. In the event that the Petitioner intends to increase, decrease or otherwise materially change the facility's capacity or operation, the owner must obtain the Commission's prior approval.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. Petitioner is and is hereby adjudged to be a "public utility" within the meaning of the Indiana Code § 8-1-2-1.

2. The Facility, of approximately 800 megawatts, is and is hereby adjudged to be a "utility" within the meaning of Indiana Code § 8-1-2-1.

3. Petitioner shall not exercise any of the rights, powers, and privileges of an Indiana public utility in the ownership, construction, and operation of the Facility, e.g., the power of eminent domain, use of public rights-of-way, exemption from zoning and land use regulation, etc.

4. Petitioner shall not sell at retail in the State of Indiana any of the electricity generated by the Facility without further order of the Commission so long as retail power service remains subject to Commission regulation.

5. Petitioner shall advise the Secretary of the Commission and the OUCC of the final plant site, in-service date, rated capacity, interconnection point with Cinergy's transmission system, and any change of ownership of the Facility, and all other reporting requirements contained in this Order. Should the information submitted to the Commission by Petitioner subsequently change, Petitioner is obligated to provide the Commission and the OUCC with updated information.

6. Petitioner shall submit to the Commission the information identified in, and in accordance with, Finding No. 4.

7. Petitioner shall submit to the Commission the information identified in, and in accordance with, Finding No. 5, 6 and 7.

8. Based on the findings and conclusions stated above and subject to the limitations and requirements contained in Ordering Paragraphs 3, 4, 5 and 6, 7 and 8 the Commission partially declines jurisdiction over Petitioner. However, if after notice and hearing the Commission determines that Petitioner either (1) has failed to commence construction of the Facility within two (2) years of the date of this Order and is no longer diligently pursuing the commencement of construction of the Facility; or (2) has not completed construction of the Facility within five (5) years of the date of this Order, then this declination of jurisdiction will automatically terminate. Petitioner must provide notice to the Commission, the OUCC, the CAC, and IPL if Petitioner subsequently determines that it will not commence construction of the Facility within the two (2) year period provided above.

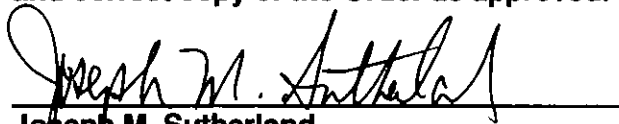
9. The gross revenues generated by sales for resale of the electricity generated by the Facility are hereby judged to be exempt from the public utility fee prescribed by Indiana Code § 8-1-6-1. 8.

10. This Order is effective on and after the date of its approval.

McCARTY, HADLEY AND ZIEGNER CONCUR;
RIPLEY AND SWANSON-HULL DISSENTING;
APPROVED:

JAN 18 2001

I hereby certify that the above is a true
and correct copy of the Order as approved.

A handwritten signature in black ink, appearing to read "Joseph M. Sutherland", is written over a horizontal line.

Joseph M. Sutherland
Secretary to the Commission

STATE OF INDIANA
INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION BY)	
COGENTRIX LAWRENCE COUNTY, LLC)	
FOR DETERMINATIONS OF THE)	
COMMISSION'S JURISDICTION OVER)	
PETITIONER'S ACTIVITIES AS AN)	CAUSE NO. 41599
EXEMPT WHOLESALE GENERATOR)	
UNDER FEDERAL LAW)	

DISSENTING OPINION OF
COMMISSIONERS JUDITH G. RIPLEY AND CAMIE J. SWANSON-HULL

Today the Commission declines to exercise jurisdiction, in part, over an 800 megawatt natural gas combined-cycle electric generation facility. With this decision, this Commission has now declined jurisdiction, in part, over 4935 mW of merchant plant production. We applaud the majority's decision to retain certain aspects of jurisdiction, but believe instead that the Commission should deny this application at this point in time. A comprehensive, regional assessment of the need for additional capacity and a more thorough analysis of the impacts of this and each subsequent application would serve the public interest.

The majority concludes that it is "confident that Petitioner's development of the Facility will not adversely affect ratepayers or consumers, or otherwise jeopardize retail electric supply." (Order, page 8) We are *not* confident of this, and have concerns with respect to the effect that this plant could have on the future reliability of retail electric supply furnished by Indiana's jurisdictional retail utilities. It is uncertain from the record whether the plant will operate as a baseload, intermediate or peaking facility. A baseload facility more significantly impacts existing and future Indiana resources. While evidence was introduced with respect to the adequacy of the water supply, gas supply and transmission system at the proposed location, the merchant plant construction market in the Midwest is constantly changing, and future resource demands by these plants are unknown. Assumptions used in studies and modeling efforts analyzing proposed capacity additions must be constantly updated to reflect the frequent changes in order to ensure legitimate study results. With each new addition there is an increased concern about the impact on the reliability of electric service and the availability of sufficient water and gas resources for Indiana residents.

We are concerned that building merchant plants has become the predominant, if not single, solution to the existing energy challenges, and that there is little emphasis on renewable sources of energy, clean coal technology, and distributed resources. We are concerned about the significant reduction in DSM expenditures. And we are particularly concerned that conservation and energy efficiency are discussed only in the context of an immediate energy crisis.

Many merchant plants are proposed for the Midwest, and factoring those plants into an analysis of the state's need for electric generation is a new and difficult challenge. The 4935 mW of merchant power in Indiana represents a significant contribution to the resolution of the immediate regional capacity shortage problem. It is time to take a closer look and determine whether it serves the public interest to have *no* control over the destination of merchant plant electricity generated in Indiana. We must ask ourselves whether there is any point in building more generating capacity in Indiana if the resulting electricity will flow out of the state.

We must endeavor to match the future supply and demand for electricity in a manner that assures the provision of reliable, efficient and economical electric service for the people of this state. This can be done only if we review a comprehensive regional assessment of the current capacity situation, maintain control over the electricity produced in our state, and thoughtfully examine all alternatives for meeting Indiana's energy needs.

For these reasons, we respectfully dissent from the majority opinion.